IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11089 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

THAKORE LILAJI KESAJI

Versus

VALLABHDAS P PARIKH

Appearance:

MR GR SHAIKH for Petitioner

MR A.D.PADIVAL for Respondent .

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 03/07/96

ORAL JUDGEMENT

The TENANCY VERSUS EMPLOYMENT is the central theme and heart of this petition under Article 227 of the Constitution of India involving applicability and interpretation of provisions of sections 2 (18),4 and 70(b) of the BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, ,1948 ('Bombay Tenancy Act' for short). Whether the

petitioners are the tenants or the servants in respect of three agricultural properties bearing survey Nos. 3911/1,3911/2 and 3909 situated in the sim of village Vadnagar,Taluka Kheralu ,District-Mehsana belonging to the respondent ('disputed lands ' for short), is the sole but substantial issue which has come up for consideration and adjudication in this petition in the light of theaforesaid provisions of Bombay Tenancy Act.

With a view to appreciate the merits of this petition, a few material facts tracing shortly the long history of litigation which is pending in the high and long legal conduit pipe since more than two decades obviously would require narration.

The petitioners by invoking the aids of the provisions of Section 70(b) of the Bombay Tenancy Act Act, claiming tenancy rights in respect of the disputed lands submitted an application before the Mamlatdar and ALT,KHERALU on 27.2.1974 who by his order dated l3.121.1978 dismissed the application holding them to be the servants and not tenants. On an appeal against that order of the Mamlatdar preferred by the petitioners before the Deputy Collector (land reforms) Mehsana being tenancy appeal no. 223 of 1979,the appellate authority dismissed the appeal confirming the finding of the Mamlatdar. Being dissatisfied by the appellant authority's order, the petitioners carried the matter in the Revision under Section 76 of the Bombay Tenancy Act before the Gujarat Revenue Tribunal ('GRT' for short). The revision came to be allowed by an order dated 8.1.1979 whereby the GRT remanded the matter to the Mamlatdar keeping the question of tenancy open.

The respondent-owner of the disputed land in the meantime,had filed Regular civil suit No. 100 of 1974 in the court of Civil Judge (Junior Division) at Kheralu and obtained interim injunction against the petitioners. The petitioners filed Miscellaneous appeal against the interim injunction order in the District court at Mehsana wherein the interim injunction order came to be quashed. Thus, the appeal was allowed after hearing the parties. The civil court had referred the issue of tenancy to the Mamlatdar and ALT ,Kheralu for his decision under the Tenancy Act as the petitioners inter alia contended that they are protected tenants in respect of the disputed lands. The GRT in remand order had also kept the question of tenancy open. The petitioners had therefore submitted an application to the concerned Mamlatdar who held that they are tenants of the disputed lands. Upon

transfer application submitted by the respondent, the case came to be transferred from the court of Mamlatdar and ALT,Kheralu to the court of Mamlatdar and ALT,Mehsana. The Tribunal at Mehsana by its order dated 24.3.1986 held that petitioners are not the tenants of the disputed lands but are servants. During the pendency of the dispute before the Mamlatdar, stay was granted in favour of the petitioners. The respondent thus had been restrained from disturbing possession of the petitioners of the disputed lands.The District court did not grant interim injunction against the petitioners in favour of the respondent-owner. Thus,interim orders of both the courts were in favour of the petitioners . By virtue of the interim orders, the petitioners have been in possession of the disputed lands during the pendency of the proceedings.

The petitioners challenged the order of the Mamlatdar,Mehsana by filing an appeal before the Deputy Collector,Patan being tenancy appeal No. 45/86. The deputy collector, by an order dated 18.8.1988 dismissed the appeal of the petitioners. The petitioners being aggrieved by the order of the appellate authority,preferred revision application No. 965 of 1988 before the GRT. The GRT by its order dated 28.9.1990 allowed the revision application and remanded the matter back to the Deputy Collector ,Patan to decide the matter in accordance with law.

After remand,the Deputy Collector ,Patan by his order dated 2.7.1992 dismissed the appeal and confirmed the order passed by the Mamlatdar and ALT,Kheralu. The petitioners being dissatisfied with the order of the appellate authority again filed revision application No. 693 of 1992 which came to be dismissed on 9.6.1994. Hence,this petition at the instance of the petitioners under Article 227 of the Constitution of India for a prayer for setting aside the impugned orders of the authorities below.

Learned counsel Mr Shaikh for the petitioners has in his marathon submissions before this court argued that the impugned orders are perverse and illegal requiring interference of this court in this petition. The submissions raised on behalf of the petitioners are seriously countenanced by the learned counsel Mr.. Padival for the respondent-owner of the disputed lands.

It is true that the jurisdictional scope of this court in a petition under Article 227 of the Constitution is very much circumscribed. The legal battle is going on between

the parties since more than two decades. The finding of facts cannot be re-assessed and re-evaluated as this court is not acting as appellate authority in a petition under Article 227. When there are findings of facts,no interference is called for unless the impugned order or decision is shown to be manifestly perverse,illegal,unjust, against the provisions of law or if it is shown to be actuated with ulterior and extraneous considerations like mala fides. Thus,there is no dispute about the fact that power of superintendence contemplated under Article 227 has been circumscribed in a very narrow compass. A finding of fact can be said to be perverse inter alia if it is such that no reasonable person would record it on the basis of available material.

After having given anxious thought to the facts and the evidence emerging from the record and considering the rival versions in light of the relevant propositions of law, this court has no hesitation in finding that the impugned orders of the authorities below are perverse, unjust and illegal which have culminated into gross miscarriage of justice to the petitioners who are in possession of the disputed lands since last four decades since the time of their father (who was aged more than 85 years) who are wrongly held to be servants against their claim of tenancy.

It appears from the record without any doubt that the authorities below have overlooked the evidence on record and have illegally rejected the claim of tenancy of the petitioners. Although the three authorities below have concurrently and consistently held that the petitioners are not tenants but are servants in respect of the disputed lands of the respondent-owner, it is running against the might of evidence on record due to non-application of mind and neglecting and failing in considering the following material aspects emerging from the record :

l. That the respondent owner of the land has admitted in his evidence that the father of the petitioners who was engaged by him had been paid remuneration by giving lumpsum produce of the crop grown in the disputed lands.

2. That the previous statement and admission of the owner are not considered in litigation pending before the Kheralu court.The owner was examined on oath before the court and he did admit that the father of the petitioners was personally cultivating the disputed lands since prior to S.Y. 2005.

3. That the respondent owner of the lands had sold agricultural equipments and instruments to the father of the petitioners for the purpose of cultivation.

4. That the owner of the lands had also sold bullocks and he had no bullocks since S Y 2005.

5. That the owner of the lands was not issuing receipts to the petitioners and also to their father.

6. That the respondent owner of the disputed land ha also admitted in his evidence before the Kheralu court on 9.10.1978 that Lilaji,son of Keshaji was cultivating the lands in question. Therefore,the finding that the petitioners have wrongly entered into the lands and cultivated the lands is not correct.

7. The Tribunal had also found that there was no substance in the case of the respondent owner that petitioners are servants. Civil suit between the parties instituted by the respondent owner is pending in which the respondent owner failed to show even prima facie case for interlocutory injunction.

8. The finding that earlier statement and admission are not relevant in the subsequent proceedings is also erroneous and illegal.

9. That it is not necessary for the tenant to file an application for declaration of tenancy rights under Section 70(b) of the Bombay Tenancy Act in view of the settled proposition of law . This court has laid down in Kalabhai vs. Taraben, 1991 (l) GLR 118 that it is not a condition precedent that a person claiming tenancy must move appropriate authority under Section 70(b) .

10. That mere part cash payment describing it as salary is not a conclusive pointer of service agreement.

11. That the petitioners who are heirs of the original tenant cannot be said to be unlawfully cultivating the lands in dispute.

12. That provisions of Section 2(18) and Section 4 of the Bombay tenancy Act are not correctly interpreted.

l3. That the authorities below have wrongly assumed that deceased Keshaji was a servant. Disputed Nokar Nama (agreement of service) is alleged to have been executed in 1955 while deceased Keshaji was in possession and

actual cultivation even much prior thereto in light of the evidence on record,which is completely disregarded.

l4. That the question of interpretation of payment cannot be said to be pure question of fact.

l5. That even if execution of Nokar Nama (agreement of service) dated 26.55.1955 is proved to have been executed, cannot be said to be final and conclusive.

l6. That there is non-application of mind to the vital facts and evidence unerringly pointing tenancy in favour of deceased Keshaji. The tenancy is inheritable right and the petitioners are heirs of deceased Keshaji. Deceased Keshaji was found to be in possession since prior to 1947.The execution of Nokar Nama (agreement of service) dated 26.5.1955 is nothing but beautiful device engineered by intelligent owner of the land to thwart heritable valuable tenancy rights acquired by deceased Keshaji in respect of the disputed lands since more than four decades.

l7. It is noticed that the three authorities below have failed to take into consideration the real interpretation of provisions of Sections 2(18) and 4 of the Bombay Tenancy Act. Section 2(18) defines the expression 'tenant' and Section 4 prescribes provisions for 'deemed tenancy'. Expression 'tenant' includes a person who is deemed to be a tenant under Section 4. It would,therefore, be necessary and interesting to have a look at the said provisions.

Section 2(18) applicable to the State of Gujarat reads as under:

"2. x x x x x
(18).'tenant' means a person who holds land on lease and includes-

(a) a person who is deemed to be a tenant under Section 4;

(b) a person who is a protected tenant' and

(c) a person who is a permanent tenant;

(d) a person who,after the surrender of his tenancy in respect of any land at anytime after the appointed date has continued, or is deemed to have continued, to remain in actual possession, with or without the consent of the landlord, of

such land till the specified date'

and the word 'landlord' shall be construed accordingly."

It could very well be seen from the aforesaid provisions that 'tenant' means a person who holds the land on lease and also includes a deemed tenant under Section 4 who is a protected tenant and a permanent tenant under Section 2(10A). Section 4 provides persons to be deemed tenants. It would,therefore, be material to refer to the provisions of Section 4 at this juncture. Section 4 reads as under :

"4.A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not-

(a) a member of the owner's family; or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owners's family,or

(c) a mortgagee in possession.

Explanation: I. A person shall not be deemed to be a tenant under this section if such person has been,on an application made by the owner of the land as provided under section 2-A of the Bombay Tenancy Act,1939,declared by a competent authority not to be a tenant.

Explanation II: Where any land is cultivated by a widow or a minor or a person who is subject to physical or mental disability or a serving member of the armed forces through a tenant then notwithstanding anything contained in Explanation I to clause (6) of section 2,such tenant shall be deemed to be a tenant within the meaning of this section" .

In ascertaining the status of a person as tenant, the mode of cultivation as shown in the Act becomes very relevant. There are ,in all, six modes viz.(i) cultivated by holder himself, (i) cultivated by hired laborer; (iii) tenant paying cash ;(iv) share of crop; (v) fixed quantity of produce and (vi) proximity of aforesaid forms. It is true that burden of proving tenancy is upon the person who asserts it or who claims it. Tenancy means relationship of landlord and tenant but in view of the peculiar and special provisions of

Section 2(18) and Section 4, a person in possession may have no relation with the landlord in a given case but he nevertheless be called as tenant.The provisions show that a person who is merely in possession,lawfully ofcourse, is also a tenant. This aspect ,with due respect to the authorities below,has not been taken into consideration.

Definition of 'tenant' is divided into two parts- one contractual and the other statutory or who can be described for brevity's sake 'deemed tenants' It could very well be visualised from the aforesaid provisions that 'deemed tenant' or a statutory tenant means a person who lawfully cultivates any land belonging to another person if such person is not a member of the owner's family or a servant on wages payable in cash or kind but not in share or a hired labour cultivating the land under the personal supervision of the owner or any member of the owner's family or a mortgagee in possession. Section 4,therefore,far from defining a statutory tenant,raises a presumption of statutory tenancy in the circumstances provided therein. A presumption can be rebutted by showing not necessarily the exceptions provided in the section itself but by other circumstances also by showing that the person holding the land is not so holding in the capacity of a tenant but in some other position. Therefore, the courts below have misread the aforesaid provisions and have failed to take into consideration the real purport,design and interpretation of section 2(18) and section 4.

While inquiring to find out as to who claims to be the tenant is cultivating land lawfully, section 4 in its design talks of tenancy in favour of a person lawfully

cultivating the land but it raises a rebuttable presumption of his being the tenant. This position is now very well settled and the legal fiction of clothing or conferring the status of a deemed tenant under Section 4 of lawful cultivation of land is,in the opinion of this court, consistent with the object of the Tenancy Act .The concept of 'tenant' in the Tenancy Act is founded primarily on 'land' and its 'cultivation'. The process of thinking embodied in section 4 is primarily based on the 'land' and its lawful cultivation and not merely cultivation. The cultivation must have its original in some lawful act and that is why the section describes and not defines a 'deemed tenant,as one who is 'lawfully cultivating any land belonging to another' that is to say, 'so cultivating any land in his own right and not on

behalf of another. The expression 'lawfully cultivating' would mean the same thing as cultivating 'on one's own account' and for 'one's own profit' ,in part or in full.The underlying purport and design behind section 4 is to protect a lawful cultivator actively engaged in the act of raising the crops on the land or its major part though he may not be holding the land on lease in a traditional sense of the terms. The expression 'lawfully cultivating' is now very well settled. It cannot exist without the concomitant existence of lawful relationship which can be proved even without the formal proof of a traditional form of lease.

It is in this context that a liberal interpretation is called for keeping in mind the socio-economic thrust . In this background,it must be remembered that liberal interpretation in keeping with socio-economic thrust would be to allow a cultivator to prove his status alternatively by resorting to the provision of section 4 where he is unable to prove a lease in term of section 105 of the Transfer of Property Act. A person who is sharing crop cannot be said to be mere holder of settlement of service. The courts below have not made judicial creative and purposive interpretation of the said provisions in a factual situation of the present case.

A provision is required to be interpreted to subserve the purpose of the Act in the factual background in a given case. It is a settled proposition of law that interpretation should be benevolent . The courts below have unfortunately recorded a perverse finding without any application of mind to the vital facts. They have also not taken into consideration the real legal proposition of interpretation of law. the court has to keep it in mind the purport and design of the provisions and has to interpret law so as to serve its purpose and needs of the time . The court cannot be a mere mechanic, a mere working mason laying brick on brick without thought to over-all design and pattern . The court has to be the architect .

Misreading of provisions, non-application of mind to the real interpretation of provisions committed by the Mamlatdar and ALT which culminated into serious perversity and illegality unfortunately came to be upheld by the appellate and revisional authorities.The land reforms came to be made and it is in this background that Bombay Tenancy Act came into being for a purpose and protection which unfortunately the authorities below have failed to notice. The traditional feature of landlord

and tenant nexus still survives in the guise of -to cultivate personally by the labourer of any member of one's family or under personal supervision of oneself or any member of one's family ,by hired labourer or by servant on wages payable in cash or kind.The sordid aspect of slogan 'land to tiller in the case of weaker section of agrarian community is unfortunately forgotten by the authorities below. The `Bombay Tenancy Act is a march of law in the land reforms legislation and thanks to this legislation which sought to restore this land to their rightful holders and,therefore, special provisions came to be incorporated in the Bombay Tenancy Act. It is in this context that sections 2(18) and 4 have provided a launching pad to successful instrument of social transformation so as to meet the exigencies of situation,
.
Administration of such social welfare legislation has been left to the revenue officers of Taluka and District No doubt, at times,they are found over-burdened with their own duty for revenue administration.But it is a poor solace in not interpreting agrarian laws in a purposive manner.
Even in this background,we have to see whether claim of the petitioners for status of tenant is justified in light of the facts emerging from the record and the above relevant propositions of law. A person lawfully cultivating any land belonging to another person would be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not a member of the owner's family or mortgagee in possession or servant on wages payable in cash or kind but not in share or hired labourer under the personal supervision of the owner. The owner of the land -the respondent herein has clearly admitted in his evidence that he was also giving share in the crop by way of remuneration.Share in crop by a servant ,even in part, can be said to be covered by the definition of person to be 'deemed tenant'.

It could very well be seen from the provisions of section 4 that person cultivating the land and wages are paid in cash or kind but not in crop share is excluded from the definition of section 4. If a person who is personally cultivating the land even in capacity of servant and who receives crop share, may be in part,could be said to have been covered by the definition of 'deemed tenant' under section 4. Apart from the other evidence on record or even evidence of the petitioners, the admission unequivocally made by the owner of the lands clearly goes to show that the father of the petitioners who was originally engaged by him for the purpose of cultivation

of lands in question four decades ago was sharing the crop. Could it be said that the father of the petitioners was not in lawful cultivation of the lands? If it is found from the record that the person cultivating the land was not in unlawful possession, then he can be said to be a deemed tenant. It is not in dispute that the father of the petitioners was not a member of the owner's family.it is also not the case that the father of the petitioners was mortgagee in possession.

Even assuming that the case of the respondent-owner is correct, then also, the admission that the deceased was sharing crop ,the produce out of cultivation of the lands in question, is 'ipso facto' sufficient to hold that the deceased was a deemed tenant under section 4.No doubt, it is found without any hesitation from the evidence of the petitioners that there was relationship of landlord and tenant.It is found from the record without any doubt that the deceased Keshaji,father of the petitioners, came to be in lawful possession of the disputed lands in 1947 or around that time. Therefore, the Nokar Nama alleged to have been executed in 1955 cannot be said to be the real design and instrument of the agreement of service. A person who is in lawful possession much prior to execution of the Nokar Nama had no reason to execute such agreement of service.

Apart from that, the record has revealed that the deceased was cultivating the lands personally who was sold instruments and equipments by the owner viz. the respondent. The respondent-owner had no bullocks of his own. How could it be conceived even for a moment that a person who does not have bullocks ,no equipments or instruments for agricultural operations could be said to have got cultivation through servants as alleged.

The decision of the apex court in the case of Jagan vs.Gokuldas,AIR 1987,sc 2429 is relied on.In that case, the landlord constructed certain Dharmashalas and temple. The appellant in that case was appointed as Pujari to worship the idols in the temple and look after the Dharmashalas Some agricultural lands were given for cultivation and under the terms of the deed, he was entitled to the crop in its entirety. He was held to be the tenant and not Pujari and/or servant. It is true that in that case, he was not paid any wages in cash or kind.. In the present case,deceased Keshaji was paid some amount in cash and he was sharing crop, the produce of the disputed lands.A person who is sharing crop ,even in part, can be said to be a deemed tenant. It is in

this context that the aforesaid decision of the apex court is very relevant . The whole purpose of section 4 is to confer deemed tenancy upon persons who are not even contractual tenants of land in question . It describes and does not define the status. Whosoever falls within the sweep of the provisions of section 4 can be said to be protected tenant.

Having regard to the facts and circumstances narrated hereinabove ,emerging from the record of the present case, when viewed in light of clause (b) of section 4, this court is of the clear opinion that the impugned orders of three authorities below are result of misreading of relevant factual position and failing to consider the real interpretation of the above propositions of law. The fact of a person cultivating the land ,as a servant, as alleged by the respondent,would make no difference because he was being paid for his service by way of crop share and , therefore, it is a clear case to attract the provisions of clause (b) of section 4 of the Tenancy Act. What is the important and acid test is to see whether a person is cultivating the land personally and is sharing crop even in part. If this is the situation, he can be said to have been covered and a person to be a deemed tenant under section 4.

In Jagan's case (supra),the apex court has interpreted the provisions of section 2(32) of the Vidarbha Tenancy Act which is pari-materia with the provisions of section 2(18) of the Bombay Tenancy Act. The apex court has also interpreted section 6 of the Vidarbha Tenancy Act which is pari-materia with the provisions of section 4 of the Bombay Tenancy Act. It is very clear from the aforesaid decision that what is required to be seen and examined is whether a person has been in lawful cultivation of the land who is not being paid any wages in cash or in kind but by way of crop share. In that case,reliance was also placed on the decision of the apex court rendered in Dahya Lal vs. Rasul Mohammed Abdul Rahim,AIR 1964 SC 1320. Dahya Lal's case was decided by a bench of five Honourable Judges of the apex court. In Dahya Lal's case, the provision which came up for consideration was section 4 of the Bombay Tenancy Act. It is clearly held in Dahya Lal's case that the Tenancy Act encompassed with its beneficent provisions not only tenants who held land for purpose of cultivation under contract from the land owners but persons who are deemed to be tenants. The ratio enunciated in the aforesaid two decisions of the apex court is attracted squarely to the facts of the present case.

Having regard to the facts and circumstances enumerated hereinabove, this court has no hesitation in finding that exercise of jurisdiction by the authorities below without addressing themselves to the vital issue and facts and misreading the evidence and non-application of mind to the real purport and design of the provisions, has culminated into perversity,grave illegality and miscarriage of justice and,therefore,this court has no option but to put it in the right shape and a legal order by exercising its exctra-ordinary,supervisory,equitable prerogative writ jurisdiction.

In the result, the impugned orders are quashed and set aside. The claim of the petitioners for declaration of tenancy rights in respect of the disputed lands is accepted. It is hereby declared that the petitioners are tenants being heirs of the original tenant covered under the definition of section 4 of the Bombay Tenancy Act. Accordingly,this petition is allowed,setting aside the impugned judgements and orders of the three authorities below. Rule is made absolute to the aforesaid extent with no order as to costs.

The learned advocate for the respondent Mr.Padival has submitted that the status-quo as on day may be ordered to be continued for a further period of eight weeks so as toenable him to pursue further remedy. This submission is accepted and the parties are directed to maintain status quo as existing today for a further period of eight weeks from today.
---

corrected